

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA**

PATRICK POPE,)	
)	
Petitioner,)	
)	
vs.)	NO. CIV-06-0471-HE
)	
JOHN SIVIOUS, RCF)	
COMMANDER,)	
)	
Respondent.)	

ORDER

Petitioner, a federal prisoner appearing *pro se*, seeks a writ of habeas corpus. Consistent with 28 U.S.C. § 636(b)(1)(B), the matter was referred to Magistrate Judge Doyle W. Argo for review. On September 14, 2006, Judge Argo issued his Report and Recommendation, recommending that the respondent's motion to dismiss the petition for failure to exhaust military appeals [Doc. #11] be granted. The matter is currently before the court on petitioner's objection to the Report and Recommendation.¹

Having considered the matter *de novo*, the court concurs with Judge Argo's conclusion that petitioner had not been discharged from active duty at the time he pled guilty to the charges against him. Petitioner argues in his objection that because he received a Department of Defense form 214 (DD 214), which he claims constituted a "separation" or "release" from service rather than a "discharge," that Army Regulation 27-10, paragraph 5-15(b) does not apply to his situation. However, as noted in the Report and Recommendation,


¹*Because petitioner has objected to the Report and Recommendation, the matter is reviewed de novo. 28 U.S.C. § 636(b)(1)(C).*

this regulation applies to “any action purporting to discharge or separate a soldier” after the preferral of a charge. AR 27-10, ¶5-15(b). Consequently, once the charges were preferred against petitioner any action to discharge or separate him from the Army, including the issuance of the DD 214, was void and petitioner remained subject to court-martial jurisdiction at the time he entered his pleas.

As petitioner has failed to exhaust his military appeals,² the court agrees that respondent’s motion to dismiss on this basis should be granted.³ Accordingly, the Report and Recommendation is **ADOPTED** in its entirety and respondent’s motion to dismiss is **GRANTED**.

IT IS SO ORDERED.

Dated this 18th day of October, 2006.



JOE HEATON
UNITED STATES DISTRICT JUDGE

²*As noted in the Report and Recommendation, petitioner’s military appeal is still pending.*

³*See Schlesinger v. Councilman, 420 U.S. 738, 758 (1975) (“federal courts normally will not entertain habeas petitions by military prisoners unless all available military remedies have been exhausted”).*